5-754

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 748.

THE MOBILE LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

SAMUEL D. BRAME.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 22, 1877.

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1 UNITED STATES OF AMERICA.

Circuit Court of the United States, Fifth Circuit and District of Louisiana.

MOBILE LIFE INSURANCE COMPANY
versus
SAMUEL D. BRAME. } No. 7,916.

Petition, filed June 6th, 1876.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana.

The petition of the Mobile Life Insurance Company, a corporation created in accordance with the laws of the State of Alabama, and domiciled at Mobile, in said state, and which, for the purpose of this suit, is entitled to be considered as a citizen of said state, respectfully shows: that Samuel D. Brame, who resides in the parish of Madison, and is a citizen of the State of Louisiana, is justly indebted unto your petitioner in the sum of seven thousand dollars, besides interest, for this, to wit:

2 That the business of petitioner is the insurance of human life by the issuance of policies of life insurance; that the same is a lawful business, and entitled to the protection of the law; that it is a matter of public notoriety that a large proportion of the people of the United States are the subjects of life insurance, and that a person who tortiously destroys a human life might well contemplate the probability that by such act he would occasion loss or damage to the life insurance company in which said life might be insured.

That prior to the 24th day of October, 1875, your petitioner had issued three several policies of insurance on the life of one Craven McLemore, viz: one for the sum of two thousand dollars in favor of John P. Kennedy, which is herewith filed, marked "A," and made part hereof; one for the sum of twenty-five hundred dollars, originally in favor of Sanders, Garner & Co., but by them lawfully assigned to John H. Garner, senior; and one for the sum of twenty-five hundred dollars in favor of John H. Garner & Co.; copies of which two last-mentioned policies are herewith filed, marked

3 "B" and "C," and made part hereof.

That the stipulated premium on said several policies had been duly paid so as to continue them in force until the 13th December, 1875.

Your petitioner avers that on the 24th day of October, 1875, while said policies were in force, in the town of Delhi, in Madison parish, Louisiana, defendant Samuel D. Brame did willfully shoot the said Craven McLemore with a double-barreled shot-gun, and inflict upon him a mortal wound, from the effects of which he died on the 26th day of October, 1875; that at the time of said shooting the said McLemore was in the peace of the state and not engaged

in the violation of any law, and that the said shooting was an illegal and tortious act on the part of said S. D. Brame.

That the said act of S. D. Brame in killing said McLemore caused damage to petitioner in the aforesaid sum of seven thousand dollars, being the amount of the aforesaid policies issued by petitioner upon his life; that due proof was made of his death by the holders of said policies, and that said death did not occur in violation of any of the conditions thereof; that the said losses have been finally adjusted and acknowledged to be due by petitioner; that petitioner has paid the loss of $2,000 on the policy held by Jno. P. Kennedy, and is ready to pay the remaining five thousand dollars, but is prevented from doing so by the garnishment thereof at the suit of sundry creditors of John H. Garner & Co. and Jno. H. Garner, Sr., holding said policies.

Petitioner avers that the said damage to petitioner happened by the fault of Samuel D. Brame, and that under the law of Louisiana he is obliged to repair it, and is indebted to petitioner in the amount thereof.

Wherefore petitioner *petitioner* prays that Samuel D. Brame be cited according to law to appear and answer this petition, and that after due proceedings he be condemned to pay to petitioner the aforesaid sum of seven thousand dollars, with interest from judicial demand, and costs, and for all general and equitable relief.

(Signed) BREAUX, FENNER & HALL,
Attys. for Petitioner.

Document "A," filed with petition, June 6th, 1876.

Mobile Life Insurance Co.,

Number,	Alabama.	Age,
1,171.	$2,000.00 Amount.	50.

(Ordinary life, without participation in surplus.) (Edition of 1871.)

Annual payment, $74.30.

This policy of insurance witnesseth, That the Mobile Life Insurance Company, in consideration of the representations made to said company in the application herefor, and of the sum of seventy-four dollars and thirty cents, lawful money of the United States, first in hand paid by John P. Kennedy, and of the payment of a like amount on or before the 13th day of December of every year during the continuance of this policy, at the office of said company, in the city of Mobile, as hereinafter provided, do hereby promise and agree to pay to John P. Kennedy, the assured under this policy, his heirs, executors, or assigns, at their office aforesaid, the sum of two thousand dollars, lawful money of the United States, (the balance

of the current year's premium, if any, being first deducted therefrom,) in sixty days after due and satisfactory proof of the death of Craven McLemore, near Williamsburg, in the county of Covington and State of Mississippi, whereupon this policy shall cease and determine.

This policy is issued by said company, and accepted by the assured, on the following express conditions and agreements:

As to application.

First. That in case the statements made in the application for this policy (on file at the office of said company, and made part of this contract), on the faith of which this policy is issued, are not in all respects true; or in case of the suppression of any fact relating to the health, habits, or circumstances of the person upon whose life this policy is issued affecting the interests of said company, then, and in either case, this policy shall be void, and all payments made hereon shall be forfeited.

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As to payments of premium.

Second. That the several payments herein specified to be made by the assured shall be made in lawful money of the United States, and not otherwise, on or before the days upon which they become due, at the office of said company in the city of Mobile, or to their duly authorized agents, when they produce receipts signed by an officer of said company; and that in case of default in said payments, or either of them, then this policy shall become void, and all payments made hereon shall be forfeited, except as hereinafter provided.

As to residence and travel.

Third. That the said person upon whose life this policy is issued shall not, without written permission, signed by an officer of said company, visit or reside in any part of the world outside of the north and south temperate zones; except that he may travel as a passenger upon the high seas (without landing at ports within the torrid zone), in a first-class sailing or steam vessel, between ports within the temperate zones, and travel between the Atlantic and Pacific ports of the United States, by way of the Isthmus of Panama. It is understood and agreed, however, that this policy does not cover the risk of war or of any casualty of war while the said person upon whose life this policy is

8

issued is beyond the settled limits of the United States or of the Dominion of Canada.

As to occupation.

Fourth. That the said person upon whose life this policy is issued shall not, without written permission, signed by an officer of the said company, personally engage in blasting as an occupation, in mining, in submarine operations, or in the manufacture of highly inflammable or explosive substances, or in the capacity of engineer, fireman, or brakeman on a railroad train, or engage in any military

or naval service whatsoever, excepting the militia when not in actual service.

As to violation of conditions.

Fifth. That in the case of death of the person upon whose life this policy is issued, resulting from the violation of either of the foregoing conditions or agreements, as to residence, travel, or occupation; or in case the said person shall die by his own hand or act (voluntary or otherwise) within the two years from the date of this policy; or in consequence of engaging in a duel; or in, or in consequence of, violating any law of any nation, state, province, or municipality, said company shall not become liable to pay upon this policy any greater sum than its net present
9 value at time of such death, computed on the basis of the American table of mortality, and six per cent. interest.

As to assignments.

Sixth. That if this policy should be assigned or held as security, written notice shall be given to said company, and due proof of interest produced with proofs of death.

As to first payments and powers of agents.

Seventh. That this policy shall not take effect until the first payment shall have actually been made; that any alteration or waiver of the conditions of this policy, unless made at the head office and signed by an officer of said company, shall not be considered as valid; and that the receipt of anything by an agent, excepting lawful money of the United States, in settlement of premiums, shall not be considered as binding on said company, unless specially agreed to, which agreement must be endorsed hereon and signed by an officer of said company.

Eighth. That this policy shall be non-forfeitable after two annual premiums have been paid, when a new paid-up insurance for an equitable amount will be given on surrender of original policy.

In witness whereof, the said Mobile Life Insurance Com-
10 pany, by their president and secretary, signed and delivered this contract, this 13th day of December, in the year one thousand eight hundred and seventy-two.

(Signed) W. L. BAKER, *President.*

(Signed) H. M. FRIEND, *Secretary.*

Received the first payment on this policy, this 14th day of December, A. D. 1872.

[SEAL.] (Signed) H. A. TAYLOR.

(Endorsed:) Conditions of payments of premiums.

The premiums on this policy are due and payable at the office of the company, in Mobile, Ala.; but for the convenience of the policy-holder the company will, unless otherwise requested, transmit to the agent through whom this policy was issued or last renewed, the receipts for renewal premium to be delivered on payment of the

stated premiums. And the assured is hereby notified that the only evidence to him of the authority of any agent to receive any premiums on account of this policy is a receipt in printed form,
11 signed by the president or secretary of this company, and countersigned by the agent to whom the money is paid.

In case of death, the company should at once be notified, when proper blanks for the preparation of "proof of loss" will immediately be sent.

$2,000.00. MOBILE, 18*th Dec'r*, 1875.

Received from the Mobile Life Insurance Company, two thousand dollars, in full for all claims under the within policy, terminated by death of Craven McLemore.

(Signed) TAYLOR & MACARTNEYS,
Att'ys for Jno. P. Kennedy.

Document "B," filed with petition, June 6th, 1876.

Mobile Life Insurance Co.,

Number,	Alabama.	Age,
1,170.	$2,500	50.
	Amount.	

(Ordinary life, without participation in surplus.) (Edition of 1873.)

Annual payment, $92.87.

This policy of insurance witnesseth, That the Mobile Life Insurance Company, in consideration of the representations made to said company in the application herefor,
12 and of the sum of ninety-two dollars and eighty-seven cents, lawful money of the United States, first in hand paid by Saunders, Garner & Co., and of the payment of a like amount on or before the 13th day of December in every year during the continuance of this policy, at the office of said company, in the city of Mobile, or to their agents, as hereinafter provided.

This policy issued in lieu of No. 1,170, for $5,000. The beneficiaries in this having transferred $2,500. Jno. H. Garner & Co., of old policy. We divide the amount and give each one for $2,500.

Do hereby promise and agree to pay to Saunders, Garner & Co., the assured under this policy, their heirs, executors, or assigns, at their office aforesaid, the sum of twenty-five hundred dollars, lawful money of the United States, (the balance of the current year's premium, if any, being first deducted therefrom,) in sixty days after due notice and satisfactory proof of the death of Craven McLemore, near Williamsburg, in the county of Covington and State of Mississippi, whereupon this policy shall cease and determine.

This policy is issued by said company, and accepted by the assured, on the following express conditions and agreements:

As to the application.

First. That in case the statements made in the application for this policy (on file at the office of said company,

13 and made a part of this contract), on the faith of which this policy is issued, are not in all repects true; or in case of the suppression of any fact relating to the health, habits, or circumstances of the person upon whose life this policy is issued affecting the interests of said company, then, and in either case, this policy shall be void, and all payments made hereon shall be forfeited.

As to the payments of premium. Second. That the several payments herein specified to be made by the assured shall be made in lawful money of the United States, and not otherwise, on or before the days upon which they become due, at the office of said company, in the city of Mobile, or to their duly authorized agents, when they produce receipts signed by an officer of said company; and that in case of default in said payments, or either of them, then this policy shall become void, and all payments made hereon shall be forfeited.

As to residence and travel. Third. That the said person upon whose life this policy is issued shall not, without written permission signed by an officer of said company, visit or reside in part of the world outside of the north and south temperate zones, ex-
14 cept that he may travel as a passenger upon the high seas (without landing at ports within the temperate zones, and travel between the Atlantic and Pacific ports of the United States, by way of the Isthmus of Panama. It is understood and agreed, however, that this policy does not cover the risk of war or of any casualty of war, while the said person upon whose life this policy is issued is beyond the settled limits of the United States or of the Dominion of Canada.

As to occupation. Fourth. That the said person upon whose life this policy is issued shall not, without written permission signed by an officer of said company, personally engage in blasting as an occupation, in mining, in submarine occupations, or in the manufacture of highly inflammable or explosive substances, or in the capacity of engineer, fireman, or brakeman on a railroad train, or engage in any military or naval service whatsoever, except the militia when not in actual service.

As to violation of conditions. Fifth. That in case of the death of the person upon whose life this policy is issued, resulting from the violation of either of the foregoing conditions or agreements, as to residence, travel, or occupation, or in case the said person
15 shall die by his own hand or act (voluntary or otherwise) within two years from the date of this policy, or in consequence of engaging in a duel, or in, or in consequence of, violating any law of any nation, state, province, or municipality, said company shall not become liable to pay upon this policy any greater sum than its net present value at

time of such death, computed on the basis of the American table of mortality and six per cent. interest.

As to assignments.

Sixth. That if this policy should be assigned or held as security, written notice shall be given to said company, and due proof of interest produced with proofs of death.

As to first payment and powers of agents.

Seventh. That this policy shall not take effect until the first payment shall have actually been made; that any alteration or waiver of the conditions of this policy, unless made at the head office and signed by an officer of said company, shall not be considered as valid; and that the receipt of anything by an agent, excepting lawful money of the United States, in settlement of premiums, shall not be considered as binding on said company, unless specially agreed to, which agreement must be endorsed hereon and
16 signed by an officer of said company. In witness whereof, the said Mobile Life Insurance Company have, by their president and secretary, signed and delivered this contract, this August eleventh, in the year one thousand eight hundred and seventy-four.

(Signed) W. L. BAKER, *President.*

[SEAL.] (Sgd.) H. M. FRIEND, *Secretary.*

(Endorsed:) Conditions of payments of premiums.

The premiums on this policy are due and payable at the office of the company in Mobile, Ala., but for the convenience of the policy-holder the company will, unless otherwise requested, transmit to the agent through whom this policy was issued, or last renewed, the receipts for renewal premium, to be delivered on payment of the stated premiums. And the assured is hereby notified that the only evidence to him of the authority of any agent to receive any premiums on account of this policy is a receipt in printed form signed by the president or secretary of this company and countersigned by the agent to whom the money is paid. In case of death
17 the company should at once be notified, when the proper blanks for the preparation of "proof of loss" will be immediately sent.

Receipt attached to Policy.

Mobile Life Insurance Company. No. 4,644.

MOBILE, ALA., *Decr. 12th*, 1874.

Receipts are not valid unless signed by an officer of the company, and when payment is made to an agent he should countersign the receipt.

Received ninety-two and $\frac{88}{100}$ dollars for the annual premium of policy No. 1,170 A, issued by this company on the life of Craven McLemore, which continues said policy in force until the 13th day of December, 1875.

$92.88

H. M. FRIEND, *Secretary.*

(Endorsed across the face:) Countersigned this 12th day of December, 1874.

Assignment, to be attached to the policy numbered 1,170, *issued by Mobile Life Insurance Company, of Mobile, Alabama.*

For value received our hereby transfer, assign, and turn over unto John H. Garner, Sr., all our right, title, and interest in policy of life insurance No. 1,170 A, issued on the life of Craven McLemore by the Mobile Life Insurance Company, of Mobile,
18 Ala., and all benefit and advantage to be derived therefrom.

Witness our hand and seal, at Mobile, Ala., this 27th day of May, 1874.

(Signed) SAUNDERS, GARNER & CO. [SEAL.]

Signed, sealed, and delivered in the presence of

(Signed) J. W. SPRATLEY.

☞Execute in duplicate. One copy must be forwarded to the home office; the other attached to the policy.

Document "C," filed with petition, June 6th, 1877.

Mobile Life Insurance Co.,

Number,	Alabama.	Age,
1,170.	$2,500.00.	50.

(Ordinary life, without participating in surplus.) (Edition of 1873.)

Annual payment, $92.88.

This policy of insurance witnesseth, That the Mobile Life Insurance Company, in consideration of the representations made to said company in the application herefor, and of the sum of ninety-two dollars and eighty-eight cents, lawful money of the United States, first in hand paid by John H. Garner & Co., and of the payment of a like amount on or before the 13th day of December in
19 every year during the continuance of this policy, at the office of said company in the city of Mobile, or to their agents, as hereinafter provided.

This policy issued in lieu of original No. 1,170. $2,500 of which was assigned to John H. Garner & Co.

Do hereby promise and agree to pay to John H. Garner & Co., the assured under this policy, their heirs, executors, or assigns, at their office aforesaid, the sum of twenty-five hundred dollars, lawful money of the United States, (the balance of the current year's premium, if any, being first deducted therefrom,) in sixty days after due notice and satisfactory proof of the death of Craven McLemore, near Williamsburg, in the county of Covington and State of Mississippi, whereupon this policy shall cease and determine.

This policy is issued by said company and accepted by the assured, on the following express conditions and agreements:

As to the application.

First. That in case the statements made in the application for this policy (on file at the office of said company, and made a part of this contract), on the faith of which this policy is issued, are not in all respects true; or in case

of the suppression of any fact relating to the health, habits, or circumstances of the person upon whose life this policy
20 is issued affecting the interests of said company, then, and in either case, this policy shall be void, and all payments made hereon shall be forfeited.

As to payments of premium. Second. That the several payments herein specified to be made by the assured, shall be made in lawful money of the United States and not otherwise, on or before the days upon which they become due, at the office of said company in the city of Mobile, or to their duly authorized agents, when they produce receipts signed by an officer of said company; and that in case of default in said payments, or either of them, then this policy shall become void, and all payments made hereon shall be forfeited.

As to residence and travel. Third. That the said person upon whose life this policy is issued shall not, without written permission signed by an officer of said company, visit or reside in any part of the world outside of the north and south temperate zones; except that he may travel as a passenger upon the high seas (without landing at ports within the torrid zone) in a first-class sailing or steam vessel, between ports within the temperate zones, and travel between the Atlantic
21 and Pacific ports of the United States by way of the Isthmus of Panama.

It is understood and agreed, however, that this policy does not cover the risk of war or of any casualty of war, while the said person upon whose life this policy is issued is beyond the settled limits of the United States or of the Dominion of Canada.

As to occupation. Fourth. That the said person upon whose life this policy is issued shall not, without written permission signed by an officer of said company, personally engage in blasting as an occupation, in mining, in submarine operations, or in the manufacture of highly inflammable or explosive substances, or in the capacity of engineer, fireman, or brakeman on a railroad train, or engage in any military or naval service whatsoever, excepting the militia when not in actual service.

As to violation of conditions. Fifth. That in case of the death of the person upon whose life this policy is issued, resulting from the violation of either of the foregoing conditions or agreements, as to the residence, travel, or occupation, or in case the said person shall die by his own hand or act (voluntary or otherwise)
22 within two years from the date of this policy, or in consequence of engaging in a duel, or in, or in consequence of, violating *anly* law of any nation, state, province, or municipality, said company shall not become liable to pay upon this policy any greater sum than its net present value at

time of such death, computed on the basis of the American table of mortality and six per cent. interest.

As to assignments. Sixth. That if this policy should be assigned or held as security, written notice shall be given to said company, and due proof of interest produced with proofs of death.

As to first payment and powers of agents. Seventh. That this policy shall not take effect until the first payment shall have actually been made; that any alteration or waiver of the conditions of this policy, unless made at the head office and signed by an officer of said company, shall not be considered as valid, and that the receipt of anything by an agent, excepting lawful money of the United States, in settlement of premiums shall not be considered as binding on said company, unless specially agreed to, which agreement must be endorsed hereon and signed by an officer of said company.

23 In witness whereof, the said Mobile Life Insurance Company have, by their president and secretary, signed and delivered this contract, this eleventh day of August, in the year one thousand eight hundred and seventy-four.

(Signed) W. L. BAKER, *President.*

[SEAL.] (Signed) H. M. FRIEND, *Secretary.*

(Endorsed:) Conditions of payments of premiums.

The premiums on this policy are due and payable at the office of the company in Mobile, Ala., but for the convenience of the policy-holder the company will, unless otherwise requested, transmit to the agent through whom this policy was issued, or last renewed, the receipts for renewal premium, to be delivered on payment of the stated premiums. And the assured is hereby notified that the only evidence to him of the authority of any agent to receive any premiums on account of this policy is a receipt, in printed form, signed by the president or secretary of this company and countersigned by the agent to whom the money is paid.

24 In case of death the company should at once be notified, when proper blanks for the preparation of "proof loss" will immediately be sent.

Receipt attached Policy.

Mobile Life Insurance Company.

MOBILE, ALA., *Dec. 12th*, 1874.

Receipts are not valid unless signed by an officer of the company, and when payment is made to an agent he should countersign the receipt.

Received ninety-two $\frac{88}{100}$ dollars for the annual premium on policy No. 1,170 B, issued by this company on the life of Craven McLemore, which continues said policy in force until the 13th day of December, 1875.

$92.88.

(Signed) H. M. FRIEND, *Secretary.*

(Endorsed across the face:) Countersigned 12th day of December, 1874. H. M. Friend, Secretary.

Citation, issued June 6th, 1876.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon Samuel D. Brame, a citizen of the State of Louisiana, to comply with the demand of the Mobile Life Insurance Company, citizen of the State of Alabama, contained in the petition, of which a copy accompanies this
25 citation, or to deliver his answer to the same in the office of the clerk of the Circuit Court of the United States, Fifth Judicial Circuit and District of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of July, 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 6th day of June, A. D. one thousand eight hundred and seventy-six, and of the independence of the United States of America the 100th year.

[SEAL.] (Signed) F. B. VINOT, *Dy. Clk.*

Marshal's Return.

Received June 7, 1876, by the U. S. marshal, and returned not served, the defendant Samuel D. Brame, after diligent search and inquiry, could not be found.

26 (Signed) S. B. PACKARD,
U. S. Marshal.
by JOHN FAHY,
June 30, '76. *Dy. Marshal.*

Alias Citation, issued July 25th, 1876.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

MOBILE LIFE INSURANCE CO.
vs.
SAMUEL D. BRAME. } No. 7,916.

You are hereby commanded, as you have heretofore been, to summon Samuel D. Brame, a citizen of the State of Louisiana, to comply with the demand of the Mobile Life Insurance Company, citizen of the State of Alabama, contained in the petition, of which a copy accompanies this alias citation, or to deliver his answer to the same in the office of the clerk of the Circuit Court of the United States, Fifth Judicial Circuit and District or Louisiana, in the city

of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased
27 one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of September, 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 25th day of July, A. D. one thousand eight hundred and seventy-six, and of the independence of the United States of America the 101st year.

[SEAL.] (Signed) F. B. VINOT, *Dy. Clk.*

Marshal's Return.

Received July 25th, 1876, by the U. S. marshal, and on the 28th day of July, 1876, served a copy hereof with petition accompanying the same on S. D. Brame, within named, by handing the same to him in person in the parish of Richland, 460 miles from New Orleans.

(Signed) S. B. PACKARD,
U. S. Marshal.

Aug. 2, '76. by JOHN FAHY, *Deputy.*

28 *Exception, filed October 26th, 1876.*

MOBILE LIFE INSURANCE COMPANY
vs.
SAMUEL D. BRAME. } No. 7,916.

Now comes Samuel D. Brame, herein cited as defendant, and excepts to the petition and action of plaintiff, on the following grounds:

First. That plaintiff's petition discloses no cause of action against this defendant.

Second. That plaintiff has no right of action surviving to her or growing out of the death of Craven McLemore, which can be urged against this defendant.

Third. That if the facts alleged in the petition be true, which is denied, then a right of action would only survive to the widow and heirs of the said McLemore.

Wherefore respondent prays that these exceptions may be maintained and that plaintiff's petition may be dismissed with costs, and for general relief.

(Signed) B. F. JONAS,
(do) W. W. FARMER,
of Counsel.

29 *Submission of Exception.*

Extract from the minutes, November term, 1876.

NEW ORLEANS, *Wednesday, December 20th*, 1876.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

MOBILE LIFE INSURANCE COMPANY
vs.
SAMUEL D. BRAME. } No. 7,916.

The exception in this cause was taken up by consent of counsel—Breaux, Fenner & Hall, for plaintiffs; B. F. Jonas, for defendant—and after hearing the pleadings and argument, the court took advise.

Judgment—Exception Sustained.

Extract from judgment book, November term, 1876.

NEW ORLEANS, *Friday, December 22d*, 1876.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

MOBILE LIFE INSURANCE COMPANY
vs.
SAMUEL D. BRAME.

30 On due consideration of this cause, the court finds that the exception is well taken. It is, therefore, ordered and decreed that the same be sustained and plaintiff's petition dismissed with costs.

Judgment rendered December 22d, 1876.
Judgment signed December 28th, 1876.
(Signed) EDWARD C. BILLINGS, *Judge.*

Petition and Order for Writ of Error, filed June 25th, 1877.

U. S. Circuit Court, District of Louisiana.

MOBILE LIFE INSURANCE CO.
vs.
SAMUEL D. BRAME. } No. 7,916.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana.

The petition of the "Mobile Life Insurance Company," plaintiff herein, respectfully shews, that it believes there is error to its prejudice in the judgment herein rendered, and desires to have the same reviewed by the Supreme Court of the United States on writ of error.

Wherefore petitioner prays that a writ of error may be allowed, returnable in the Supreme Court, upon petitioner giving bond

31 approved by the court in such sum as the court may fix, and that defendant, Samuel D. Brame, be cited according to law, and for all proper order in the premises.

(Signed) BREAUX, FENNER & HALL,
Attorneys for Petitioner.

Order.

A writ of error is allowed in this case as prayed for, and, according to law, returnable to the Supreme Court of the United *States*, on the second Monday of October, 1877, the petitioner giving bond in the sum of one hundred dollars, with good and solvent security, conditioned as the law directs.

New Orleans, June 25th, 1877.

(Signed) W. B. WOODS, *Judge.*

Bond for Writ of Error, filed June 25th, 1877.

Know all men by these presents, that we, the Mobile Life Insurance Company, as principal, and Charles E. Fenner, as surety, are held and firmly bound unto Samuel D. Brame in the full and just sum of one hundred dollars, to be paid to the said Samuel D. Brame, his certain attorney, executors, administrators, or
32 assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein the Mobile Life Insurance Company is plaintiff and Sam'l D. Brame defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel D. Brame citing and admonishing him to be and appear at a supreme court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Mobile Life Insurance Company shall prosecute the
33 writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) MOBILE LIFE INSURANCE CO., [L. S.]
By BREAUX, FENNER & HALL,
Solicitors.

(Signed) CHAS. E. FENNER. [L. S.]

Approved June 25th, 1877.

(Signed) W. B. WOODS, *Judge.*

34 United States of America, Circuit Court of the United States, Fifth Circuit and District of Louisiana.

Clerk's Office:

I, Francis A. Woolfley, Clerk of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, do hereby certify, that the foregoing 33 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial in the case of The Mobile Life Insurance Company versus Samuel D. Brame, No. 7,916 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 14th day of July, A. D. 1877.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, W. B. Woods, United States Judge for the District of Louisiana, do certify, that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court: that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 14th day of July, A. D. 1877.

W. B. WOODS, *Judge.*

35 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States in and for the Fifth Circuit, and holding sessions for the District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the Mobile Life Insurance Company and Samuel D. Brame, a manifest error hath happened, to the great damage of the said Mobile Life Insurance Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Endorsed:) United States Circuit Court. No. 7,916. Mobile Life Ins. Co., plaintiff in error, vs. Sam'l D. Brame, defendant in error. Writ of error. Filed June 25, 1877. F. B. Vinot, dy. clk.

(Endorsement on cover:) Louisiana C. C. U. S. No. 748. The Mobile Life Insurance Company, plaintiff in error, vs. Samuel D. Brame. Filed 22 September, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 748.

MOBILE LIFE INSURANCE Co., PPAINTIFF IN ERROR

versus

~~DANIEL~~ D. BRAME, DEFENDANT IN ERROR.

Argument of Counsel for Plaintiff in Error.

CHAS. E. FENNER,
Counsel for Plaintiff in Error.

Clark & Hofeline, Book Printers, 112 Gravier St.

SUPREME COURT OF THE UNITED STATES.

No. 748.

MOBILE LIFE INSURANCE Co., PPAINTIFF IN ERROR

versus

Saml ~~DANIEL~~ D. BRAME, DEFENDANT IN ERROR.

Argument of Counsel for Plaintiff in Error.

STATEMENT OF CASE.

This is an action by Life Insurance Company, against the unlawful slayer of the person whose life was insured, for the damages occasioned to said company, by the said act of killing.

An exception of no cause of action (equivalent to a *general demurrer*) was interposed by defendant, and sustained by the Circuit Court, not because of any defect in the petition, but on the broad ground that the injury complained of is not actionable.

ASSIGNMENT OF ERROR.

The ruling of the Court below in sustaining the demurrer, is assigned as Error.

ARGUMENT.

The question is a new one in the jurisprudence of this Court.

The right of action by relations of deceased against the authors of the death, has been frequently considered by the courts of this country and of England, and the decisions are conflicting; but I am not aware that it has ever been raised in this Court.

The precise question involved here of the right of action of a Life Insurance Company against the unlawful slayer of the insured, has never been determined but once by any Court, so far as my researches have extended; viz: the Supreme Court of Connecticut, in the case of Conn. Mut. Ins. Co. vs. N. Y. and N. H. R. R. Co., 25 Conn. 265.

GENERAL CONSIDERATIONS.

Plaintiff does not sue for the damage done to the insured by the violation of his personal right to live. It sues for the direct loss and damage inflicted upon itself by the unlawful act of defendant. The unlawful act happens to be a homicide; but had it been any other unlawful act, resulting in an equally direct injury to plaintiff, the case would have been the same. Defendant is sued, not because he killed McLemore, but because he did an unlawful act, the direct consequence of which was to damage and inflict pecuniary loss upon plaintiff. The act being unlawful, we have nothing to do with the motive or intention of the wrong doer.

The authorities agree that a man is responsible for any direct damage to another, resulting from his unlawful act.

See 1 Chitty on Plead., 125 to 130, 147; 1 Hilliard on Torts, 97; Field on Damages, sec. 599; Scott vs. Shepherd, 2 W. Bla. 892; Reynolds vs. Clarke, Str. 635; Salsbury vs. Hershinroder, 106 Mass. 458; Smith vs. Rutherford, 2 Serg. and Rawle, 358; Mott vs. Hudson R. R. 8 Bosw. 345; and particularly Ricker vs. Freeman, 50 N. H. 420.

For the purposes of this case, it stands admitted that the act of defendant was unlawful; and it would be difficult to conceive of a more direct consequence than the damage done to plaintiff. The damage is not only direct, but it is also a certain pecuniary loss thoroughly appreciable in dollars and cents according to scientific life-tables, which have been frequently recognized by the Courts as proper standards in estimating such damage.

See Field on Damages, § 632; Rowley vs. London, R. Co., L. R. 8, Exch. 221; David vs. Southwestern R. Co., 41 Ga., 223; Donaldson vs. Mississippi R. Co., 18 Iowa, 280; Blake vs. Midland Co., 18 Q. B., 93.

And yet it is said that this plaintiff, thus as certainly and directly damaged by the unlawful act of defendant as if he had stolen so much money from its safe, has no right of action against him.

If the plaintiff has no right of action against defendant, it is apparent that it has no other possible remedy; and the maxim of the law that "there is no wrong with-

out a remedy," and the equally well-settled principle of law that a man is responsible for the direct damage to another caused by his unlawful act, are subjected to a most remarkable exception.

The essential elements of an action of damages are three, viz:

1st. *Injuria*, or a violation of some legal right or interest of plaintiff.

2nd. *Damnum*, or a loss sustained as a consequence of the injury.

3rd. That the *damnum* be the proximate effect of the *injuria*.

It will not be disputed that the last two elements are presented in this case.

The only question will be as to the first. Let us first look at the true nature of the contract of life insurance.

The latest author on the subject, Mr. May, repudiates all distinction between the insurance of *human life* and the insurance of *things*, as to the essential nature of the contracts; and defines insurance (of every kind) as "a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss." He likens a policy of life insurance to a *valued* policy of marine or fire insurance, and adds: "The purpose in all is alike—indemnity for the loss of a *valuable interest*. * * There must be this interest to support the contract. This is essential. What it shall be, provided it be valuable, and how its value shall be arrived at, are simply incidental

questions; and, however they may be answered, do not change the nature of the contract from one of indemnity based upon *an interest to be protected*, to a mere wager based on no interest at all."

May on Insurance, Secs. 1, 7.

"Whatever has an appreciable pecuniary value and is subject to loss or deterioration, whereby one's pecuniary interest is or may be prejudiced, may properly constitute the subject matter of insurance." Id. Sec. 72.

"Under these qualifications the contract may embrace not only personal property and real estate, but the *life*, health and personal liberty of man," etc. Id. Sec. 73.

On the question of what constitutes an insurable interest in a human life, "one thing may be taken as settled, that every man has an interest in his own life to any amount at which he chooses to value it, and may insure it accordingly." Id. Sec. 106.

"A wife has an insurable interest in the life of her husband." Id. Sec. 107.

A creditor in the life of his debtor. Id. Sec. 108.

Doubtful whether "relationship, with its attendant rights and obligations, as between father and son reciprocally, is a sufficient foundation upon which to rest an insurable interest"—unless the pecuniary value of such interest be specially established. Id. Secs. 107, 103, 104.

These views of Mr. May seem to be philosophical and sound, and well supported by the numerous authorities referred to by him.

They have been quoted for the purpose of establishing three propositions, viz:

1st. That under the law of insurance, the life of a man has an appreciable pecuniary value, and is permitted to be valued in money.

2d. That third persons may have a direct pecuniary interest in such life, which is the very foundation of the right to insure.

3d. That in the contract of insurance, an *insured life* occupies the same position as an *insured thing*, and the parties should have equal protection against damage caused by unlawful destruction of the one as of the other.

COMMENTARY ON THE CONNECTICUT CASE.

Bearing these principles in mind, let us examine the grounds upon which the Supreme Court of Connecticut (in the case above referred to, 25 Conn., 265,) determined that no right of action existed in such a case.

But a distinction must first be observed which exists between that case and the one at bar. In that case the insured lost his life by an accident while he was a passenger on defendant's Railroad, the result of negligence merely; of a violation of the duty of care and diligence which the defendant owed to its passenger, as a common carrier, by virtue of its contract of carriage.

It might well be contended that the fault, in such a case, was the violation of a private duty, owed to the insured by reason of particular relations subsisting between him and the carrier, strictly personal to him, and of which

the Insurance Company had no right to exact the performance, and could have no remedy for the non-performance. The loss of his life by the negligence, however gross, of the insured himself, would have been no defense for the insurer. Accidents of this kind whether from the negligence of the insured or of others, may be considered as perils contemplated by the policy. But the case at bar is one of *tortious homicide*, the violation of a public law made not merely for the protection of individuals, but of society; in which every citizen has an interest; obedience to which every citizen has a right to expect and exact, and of the violation of which every citizen has a right to complain. The duty to obey these laws is so absolute that the citizen may assume in all his dealings that they will be obeyed. In the particular contract here concerned, we have shown that the plaintiff expressly placed the life of the insured under the protection of the law, by refusing to insure against his own violation of the law. The law of Louisiana very clearly recognizes the distinction which we have thus made. The Supreme Court of Louisiana says that "damages *ex delicto* flow from the violation of a general duty," and quotes with approval the remarks of Marcadé, the French commentator, who says that damages *ex delicto* "result from the violation of a duty properly so-called, of one of those general duties, existing for the benefit of all persons, and not from the violation of a duty owed specially by one particular person to another."

See Kohn vs. Carrollton, 10 An., p. 720.

And this consideration undoubtedly lies at the foundation of the general rule of law, that a man who does an unlawful act, is responsible for the direct damage occasioned thereby to any other person, without regard to his motive or intention. If these views be correct, it follows that the unlawful killing of ~~Brame~~, the insured, was a violation of a duty of which plaintiff in common with all other citizens had a right to require the performance, and constituted a technical *injuria*.

The decision of the Supreme Court of Connecticut is based upon two grounds, viz:

1st. That the death of a human being, whatever be its consequences, pecuniary or in any other aspect, is not an actionable injury.

At common law. This absurd and mischievous doctrine according to which a father may recover damages, for loss of services, from him who unlawfully maims his minor child, but none from him who slays him, and according to which it is made the pecuniary interest of a man to kill outright any person whom he has unlawfully hurt or wounded—has, at best, an exceedingly doubtful foundation in the common law; and whatever foundation it has, rests upon reasons originating in peculiar conditions of society and ancient legal doctrines which belong to a by-gone age and have no application whatever to modern social organism.

There is certainly no clear and distinct authority for it in the common law, prior to the *dictum* of Lord Ellen.

borough in Baker vs. Bolton, 1st Compbell, 143, except as applicable to cases of felony based upon the principle that the private wrong is merged in the felony. See Higgins vs. Butcher, 8th Yel. 89. Bacon's Abr. Martin & Seuvant (O); 2 Rolles, 542, L. 42, 4 Black, Con. 6. The reason for this particular application of the doctrine, was that under the feudal system and in the early common law, felony involved the forfeiture to the crown, not only of the feudal grants of real estate which were made upon condition that the tenant should not commit a felony, but of all the goods and chattels of the felon. See Wright on Tenures, Chap. 1; 2 Bl. Com. 153; 4 id. 94. It involved the further penalty of death; so that the whole property and the life of the wrong-doer being forfeited, "nothing remained to satisfy a private demand, and no person against whom the action could be brought. The private action was therefore neccessarily gone, or as it is usually expressed, the private wrong was merged in the felony." See Plummer vs. Webb, Ware, R. 80. This principle applied to felonious homicides only in common with other felonies. It is very clear that the foregoing reasons for the doctrine have no existence whatever in the civil polity of this country, and *ratione cessante cessat estiam lex.*

There is, however, another reason for the doctrine as to felonies, which is that the complaint of the private injury shall not be heard until after the public injury has been complained of. See 1 Hale, P. C. 546; Crosby vs. Long, 12, East 409; 17 Vesey, 327.

This is the only reason regarded in the modern decisions; and this doctrine of Merger, if it exist any longer at all, is at least limited to this; that the private action will not lie until the public prosecution has been instituted.

See White vs. Speltigue, 13 M. & W. 603; Marsh vs. Stone, 6 B. & C., 551, 557, 564; Wells vs. Abrahams, Law Rep. 2 C. P. 615; Osborn vs. Gilbert, Law Rep. 8 Exch. 88.

In the case at bar, no such exception is taken, and it will be admitted that defendant had been prosecuted and acquitted before this action was brought.

If there was any other foundation in the common law for the broad dictum of Lord Ellenborough, than the obsolete and exploded doctrine above referred to, no authority for it has ever been produced. Lord Ellenborough refers to none and gives no reasons. Nor have any of the other learned judges, who have blindly followed his lead in later cases, cited authority or furnished any valid reasons. On the other hand, Comyn lays down the doctrine that "Trespass lies by a master, for the battery of a servant, *per quod etc., after the death* of the servant." Comyn's Dig. Trespass (b. 5). And in a Connecticut case decided several years before Baker vs. Bolton, a husband recovered against a physician who had so unskillfully amputated the breast of plaintiff's wife as to cause her death in three hours, for cost, expenses and loss of society of his said wife.

Cross vs. Guthuie, 2 Root. 90.

Strange to say, this case was not noticed by the Connecticut Court in the case which we are disucssing.

Nor has the dictum of Baker vs. Bolton, become fixed in the law by subsequent acquiescence. On the contrary it narrowly escaped reversal very recently in the Exchecquer Court of England, where it was adhered to only by the majority of two Barons against one, and the dissenter evidently had the best reasons on his side.

See Osborne vs. Gillett, 8 Exch. 88. In numerous other cases, particularly in this country, it has been overruled.

See Jones vs. Perry, 2 Esp. 482; Ford vs. Monroe, 20 Wend. 210; Shields vs. Yonge, 15 Geo. 349; Cutting vs. Seabury, 1 Sprague, 522; Hirer vs. Sea Gull (by Chief J. Chase) 2 Am. L. T. R. 15; Price vs. Highlandlight, Id. 118; James vs. Christy, 18 Mo. 162; Plummer vs. Webb, Ware, 80; and particularly the vigorous opinion of Judge Dillon in the case of Sullivan vs. Union P. R. R. reported in 1st Cent. L. J. p. 595.

THE CIVIL LAW AND THE LAW OF LOUISIANA.

The question whether the death of a human being can be the ground of a cival action in the civil law or in the law of Louisiana has been considered by the Supreme Court of that State in two cases, both of which were actions by a widow for the death of her husband.

The first case is that of Hubgh vs. N. O. and Carrollton R. R. Co., 6th An. R. p. 496. In this case the Court rendered first an original opinion, on which it granted a rehearing, and afterwards an opinion on rehearing. In

the first, it summarily disposed of the question on the ground that "actions for personal injuries were strictly personal;" that "the only private rights which laws recognize, are rights of persons and rights of property; that plaintiffs do not complain of any injury to their *own persons*, and it cannot be pretended that they had any rights of *property* in their husband or father," This position would apply to every other personal injury equally with tortious homicide, and is utterly unsound. This has been since expressly decided in the case of Black vs. Carrollton R. R., 10 Annual 34, where a father recovered from a railroad, the damage suffered by him on account of an injury to the son by the upsetting of a car; and it was held that he could recover not only "the actual pecuniary loss, proved" but the prospective loss, "likely to arise from the crippled state of his son, which may render him a burden to his father during a period when he would, were it not for the accident, be able to provide for his own support, if not to succor and assist his father."

It was no doubt because of the untenable character of the reasons given in the orignal opinion that a rehearing was granted. And in the final opinion delivered by Judge Eustis, the position of the Court was entirely abandoned and the only question examined was "whether the death of a free person could be the ground of a civil action." The right of action was claimed under the Article 2294 of the Civil Code of Louisiana, which provides: "Every act whatever of man that causes dam-

age to another obliges him by whose fault it happened, to repair it" This Article was copied *verbatim* from the Napoleon Code, and it was shown that the highest Court of France has repeatedly interpreted it as sanctioning actions by persons damaged by the death of another against persons by whose fault the death happened.

See Chavoix vs. Enfants Duport, Journal du Palais, 1853, Vol. 1, p. 614.

Rolland's case, 19th Sirey, p. 269.

But Judge Eustis took the ground that the article referred to must be construed with reference to the jurisprudence of this State, and that "the interpretation and application of the article adopted by the Court of Cassation in relation to the responsibility of the slayer to the *widow and heirs* of the deceased, were not consistent with our jurisprudence, and consequently inadmissible."

He concludes from an examination of the Civil and Spanish laws, which form the basis of Louisiana jurisprudence, that no such action was allowed under those systems. It is not my purpose, because it would perhaps be unavailing, to criticise the soundness, of this conclusion; but I refer the Court to the learned criticism of it contained in the brief filed in the subsequent case of Hermann vs. Carrollton R. R., published in the 11th An., 5; not doubting that the Court will conclude that if Judge Eustis had had before him all the numerous texts of both the Civil and Spanish law there cited, he would have determined differently. The authorities were so overwhelm-

ing, that, in the later case, the Court yielded to the authority of the Hubgh case only reluctantly and undoubtedly on the ground of *stare decisis*; and more than intimated that if the question had been *res nova*, it might have been decided differently.

It is sufficient for our purposes to confine the authority of these decisions to the *question decided* and to the *reasons* of the decision. and to show that the case at bar presents a *different* question and one to which the same *reasons* have no application. What is the *question* decided? It is that no civil action can be maintained by the *wife and children or other relations*, for the death of a free person.

What is the *reason*? Because *the value of the life of a free man cannot be estimated in money.*

The reason of the rule is entirely confined to the case in which it was applied. The learned counsel of the defendant in the case of Hermann vs. Carrollton R. R. said in his brief: "The policy of this principle of the Roman law is obvious. It was necessary in order to preserve the sanctity of the family—an institution upon which the Roman civilization was based and over which Christianity extended its blessed protection. The scrutiny, enquiries and calculation as to the value of human life to a wife or heir, lead to scandal, to the disturbance of the family peace, and in most cases are impotent, absurd and utterly fruitless." 11 A., p. 20. These reasons are not without force and are doubtless the true reasons

of the rule. It may well be said that the value of a husband's life to his wife is not capable of estimation in money; and that it is a violation of decorum and insulting to the memory of the dead to set a marketable value upon so tender a relation.

But how utterly and absurdly inapplicable are these considerations to this action of an insurance company for the damages inflicted upon it by the tortious homicide of its insured!

The very adoption of the system of life insurance was itself an abrogation of the rule so far as everything connected with that system is concerned. Indeed in France life insurance was expressly forbidden by an ordinance in 1681, based upon the maxim that "the life of a freeman is above all estimation—*liberum corpus estimationem non habet.*"

See Reynolds on Life Insurance, p. 10.

Lord vs. Doll, 12 Mass., 115.

And such prohibition is the only logical result of adhesion to this doctrine. For, as has been shown, the contract of life insurance is based directly upon a pecuniary valuation of the insured life to the person in whose favor it is made. In fact, the broad dictum that "the death of a human being cannot be the ground of a civil action" would be a bar to any action whatever on a contract of life insurance.

But, in Louisiana, the system of life insurance has long been recognized and favored by both her laws and courts.

See Rev. Statutes, Sec. 1874; Succession of Risley, 11 Rob. 298; Kennedy vs. N. Y. Ins. Co., 10 A., 809; Succession of Richardson, 14 A. 1, and many other cases.

We have heretofore shown that under the system of life insurance, the life of a man is regarded by the law as having an appreciable pecuniary value; that third persons may have a direct pecuniary interest in such life, which is a necessary foundation for the right to insure; and an insured life, or the insurable interest in a life, occupies the same position, as an insured thing under a valued policy of fire or marine insurance.

See May on Insurance *ubi cit-ante*, and Kennedy vs. N. Y. Life Ins. Co., 10 An. 809, which confirms these views.

Whatever other objections may lie against the action of plaintiff herein, it seems too clear for further argument, that the law permitting the valuation of the interest in this life for the purpose of insurance, it cannot be opposed on the ground that it is not decorous to set a value upon the life of a freeman, or that the value is incapable of estimation.

We, therefore, logically reach the position that the right of the plaintiff to recover from the unlawful destroyer of the insured life, is precisely the same as the right of a fire insurance company which has paid the loss, to recover from the unlawful incendiary of an insured house.

Considering this branch of the case first on the com-

mon law principles invoked in the Connecticut case, we perceive at once that the insurance company in the latter case has a perfect remedy. It is useless to refer to the numerous cases in which this question has been considered, since it has been fully decided in this very Court, in the case of Hall & Long vs. The Railroad Companies, 13 Wall. p. 367, where the doctrine is substantially stated to be that "in respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier (or other person,) for non-performance of his legal duty;" that the insurer stands "in the position of a surety;" and that "an insurer who has paid the loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty has caused the loss."

The Court further says: "His right depends upon familiar principles of *equity* It is the doctrine of subrogation, dependent not at all upon *privity of contract*, but worked out through the right of a creditor or owner." This technical rule, originating in the doctrine of privity, and framed to meet the requirements of the common law forms of action, has thus far been tolerated in cases of marine and fire insurance, because, although a mere fiction, it did not interfere with the substantial rights of the insurer, who found a sufficient remedy without departing from the rule. But it is manifest that the *reason* why the insurer was permitted to recover under this doctrine of

subrogation was because the damage inflicted had fallen upon him, and he should in justice be allowed to recover it. The same *reason* applies to the case of the insurer of of a life, who has paid its insured value. The insurer has suffered the loss, and should recover from the wrong-doer. But, because the wrong-doer, has by the very nature of his wrong, rendered the doctrine of subrogation and the consequent form of action prescribed under it, impossible, shall the insurer therefore be denied all remedy?

The Court would hesitate to carry technicalities to so absurd a length.

But there is no occasion to discuss this question further, or to examine the rights and obligations incident to the peculiar nature of the case at bar, where the life has been insured, not by the subject of insurance, but by a creditor for his own benefit; because this case is to be governed by the law of Louisiana, and that law does not concern itself with doctrines of privity, or subrogation, or forms of action, but gives the remedy invoked upon much broader grounds.

The Civil Code of Louisiana contains the following articles:

Art. 2314. "Every act whatever of man that causes damage to another, obliges him by whose fault it happened, to repair it; the right of this action shall survive in case of death, in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father or mother, or

either of them, for the space of one year from the death." (The last clause of this article was added after the decisions in the cases of Hubgh and Herman heretofore quoted, for the purpose of continuing in the wife and children the right of action which the deceased had for the personal injury to him.) See Earhart vs. Carrollton, 17 A. 243.

Art. 2316. Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill."

These articles (except the addition above referred to,) are literal translations of Articles 1382 and 1383, of the Napoleon Code. But the authors of the Louisiana Code went farther, and added the following article not contained in the Napoleon Code.

Art. 2324. "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable *in solido* with that person, for the damage caused by such act."

It would be difficult to state more broadly the responsibility of *every* person for *any* damage to *any other* person, resulting from *any* fault or *any* unlawful act.

These principles were not new, but were recognized in the civil law and in all the systems founded thereon.

Domat, who wrote long before the code, says: "All the losses and all the damages which may happen by the act of any person, whether out of imprudence, rashness, ignorrance of what one ought to know, or other faults, however trivial they may be, ought to be repaired by him whose

imprudence or other fault has given occasion to it. For it is a wrong that he has done, even although he had no intention to do harm."

Strahan's Domat, 1st Vol., p. 617.

All the French commentators agree that there are only three elements essential to establish responsibity, viz:

1st. That the act complained of be *a fault* i. e. *unlawful*, whether the unlawfulness consists in doing what the law forbids, or in failing to do what the law requires, the latter comprising the neglect of that care and prudence, and skill which the law imposes upon a person in any given case.

2d. That the act complained of be *imputable* to the author of it, *imputable* being a technical phrase signifying that the act resulted from the *free will* of the actor, excluding acts of persons not morally responsible or *doli capax* such as infants and insane persons, and also acts which one has been constrained to do by violence.

3d. That the act *occasion* damage to the complainant.

These three elements concurring, the right of action is perfect.

See 2, Mourlon Examen du Code Nap., p. 887, *et seq.*

5 Larombière, Thér. et prat. des obligations, p. 686, *et seq.*

6 Toullier, Droit Civ. Francais, p. 124, *et seq.*

2 Boileux, Com. sur le Code Civile, p. 739, *et seq.*

5 Marcadé, Droit Civil Francais, p. 282, *et seq.*

Toullier says: "No excuse is found in want of inten-

tion to injure, nor in the degree of the fault. The law, in full accord with reason, requires that one should repair the damage caused by his fault, however slight; because it is beyond question more just that the author *even indirectly* of the damages, should bear the loss, however slight be his fault, than him who is guilty of no fault at all. Hence no excuse is allowed for ignorance of what one ought to know. * * None for the weakness of him who undertakes a thing beyond his capacity. * * No exception whatever; every act whatever which causes damage to another, obliges him by whose fault it happened to repair it, as well when he had no intention to injure, as in the case of offences and quasi-offences." 6 Toullier, p. 124.

Larambière is equally emphatic.

"It is entirely indifferent, so far as the principle of the action, and the subject matter of the offence are concerned, whether he who complains has experienced damage in his goods, in his person, in his life, or in his honor and reputation. In whatever way the act complained of touches him and causes him damage, he is equally injured in his rights."

5 Larambière, p. 687.

Again: "Thus, rashness, carelessness, lack of foresight, ignorance and error, even though in good faith, equally entail responsibility. Is it not just, in fact, that he who has caused the damage should bear the penalty, rather than he who has suffered it, without any fault of his own,

and in most cases, without the power of protecting himself from it, or of preventing it?" Id. p. 689.

Again: "As to the right of the party injured to require reparation of the damages which he has sustained, the action resulting from it exists equally in his favor, whether the offense or quasi-offense has caused him a material or moral damage. and whether it be in a manner *direct or indirect.* When he has been directly and personally injured in his own person, his own fortune, his own reputation and honor, the damage is more easily appreciable. But it is not the less true that one may be indirectly injured in the property or in the person of a third person, and may experience resultant damage from acts directed against the rights of the latter. It suffices, however, that the offense or quasi-offense has been the cause of any damage whatever to him without his having voluntarily and imprudently exposed him to it, in order that he may have a personal action. *Thus a company of insurance against fire, which has been compelled to pay the insured owner, has the right to sue in damages the author of the fire. Nor is his action founded on any subrogation legal or conventional to the rights of the assured. It is based solely on Art. 1382, which obliges every person to repair the damage which he has caused by his fault. For it is incontestable that the incendiary has caused injury to the Insurance Company since it has placed it under the necessity of paying the loss.*"

Id. p. 713.

This doctrine has been expressly confirmed by the French Court of Cassation in the case of "Compagnie d'Assurance La. Prudence," Journal du Palais, 1853, vol. 1, p. 49, where it was held that the action for the loss "existed entirely independently of the action which might have resulted under the doctrine of subrogation, and in the absence of all subrogation, attaches personally to all those who have suffered damage by the fault of another."

These authorities and this decision would certainly seem to settle the case, unless the counsel for defendant can point some provision of Louisiana law different from the provisions of the French law on the subject, or can give some special reason why the interpretation of the Louisiana law should be different from that of the French law.

It certainly cannot be said that the recent addition to Art. 2314 La. Code, directing that the action of the person injured shall survive, in case of death, to his wife and other designated relations furnishes such reason; because that only applies to *his* right of action, and the right here claimed is decided to exist independently of that. In all other respects the articles of the two codes are identical except that the Louisiana Code adds emphasis to the doctrine contended for, by adopting Art. 2324 not contained in the French Code, declaring broadly that a man "shall be answerable for the damage caused," not only by *his own* unlawful act, but by the unlawful act of any other person, which he causes, assists or encourages.

In the Hubgh case, Judge Eustis said substantially that "the decisions of the Court of Cassation may be considered as furnishing a sure guide to the application of the articles of the Code of Louisiana, similar to those of the French Code, in cases in which the former jurisprudence of Louisiana was similar to that of France." He held in that case, that the decisions of the French Court were not authority, because under the former jurisprudence of Louisiana he says "the death of a free person cannot be the ground of an action of damage," by the *relations* of the deceased and for the reasons there given. But it has been shewn that this doctrine cannot apply to cases arising under the system of life insurance, because, if so, the *cestue que* insured could not recover the the loss from the insurer; for it is evident that the *death* would be the ground of such an action. Is it pretended that there existed any *other* difference between the former jurisprudence of Louisiana and that of France, which requires a different application of these articles?

The case at bar presents all the elements essential to the action viz. an *unlawful* act—the killing of the insured; *imputable* to defendant, because it is not pretended that he was *non compos* or controlled by *vis major; damage caused* to plaintiff by the act, in being compelled to pay the loss as the direct result of the act. All the French commentators agree that where these elements combine, the right of action exists, and our Supreme Court has said that "when jurists of a race so much addicted to

theoretical speculation and so little to reverence for each other's opinions, as the French commentators, draw a conclusion from the Code, in which they unanimously concur, it may, perhaps, be set down for an obvious truth."

Johnson vs. Bloodworth, 12 An. 699.

While the precise question has not been decided by the Courts of Louisiana, the general tenor of the decisions is in harmony with the French jurisprudence.

See Kohn vs. Carrolton, 10 A. 919.

Smith vs. Berwick, 12 R. 20.

Donovan vs. New Orleans, 11 A. 711.

Eclipse vs. Pontchartrain, 24 A. 1.

Grant vs. McDonough, 7 A. 447.

Small vs. Bonnabel, 8 A. 92.

Brannan vs. Hoel, 15 A. 309.

Beausoliel vs. Brown, 15 A. 543.

Black vs. Carrollton, 10 A. 34.

It is not believed that any distinction can possibly be drawn between the right of a life insurance company, and that of a fire insurance company, to recover damage occasioned by an unlawful act destroying the thing insured.

This case might have been submitted on the peculiar law of Louisiana, but as the questions were new and important and the decision likely to affect constantly recurring cases, it has been deemed proper to furnish the Court with all the light which investigation has thrown upon them.

The remedy herein contended for, being thus fully sanctioned by law, is equally commended by every consideration of justice and public policy. It will have a tendency to diminish the risks of human life and lower the rate of premiums, thus favoring the interests of the large mass of citizens concerned in the beneficent system of life insurance; and it will furnish an additional sanction to the laws for the protection of human life, for the violation of which, in many parts of our country, the criminal penalties imposed furnish scant remedy, especially where the criminals are rich—the very class who would be most restrained by the sense of pecuniary responsibility.

SUMMARY.

The case of plaintiff in error rests on the following propositions:

1st. That the Louisiana cases of Hubgh vs. Carrollton R. R. Co., and Herman vs. Same, have no application, because they are confined in their application to actions for damages by *relations* of the deceased, and that neither the terms nor the reasons of those decisions extend to the action at bar.

2d. That the amendment to Art. 2294 (now 2314) of the Civil Code of Louisiana does not affect the case at bar, because that only applies to the right of action of the *deceased* for the damage done to *him*.

3d. The Connecticut case of Mut. Life Insurance Co.

vs. N. Y. and N. H. R. R. Co., does not control the case at bar, because, (1°) it is believed to be erroneous, and is but a single case and not entitled to greater weight as authority with this Court than results from the force of its reasoning; and, (2°) because the case at bar is governed by the law of Louisiana, which differs from the common law and the law of Connecticut.

4th. The contract of life insurance is similar to a valued policy of fire or marine insurance, and the right of the insurer who has paid the loss, to recover from the tortious destroyer of the thing insured, is the same in one case as in the other.

5th. That under the law of Louisiana, which does not differ from the French law in this particular, the right of action of the insurer in the foregoing case, results directly to him without the intervention of any doctrine of subrogation.

6th. That Articles 2314, 2316, and 2324 of the Revised Civil Code of Louisiana fully sanction the action in this case, unless excluded by some authoritative interpretation of those articles, and that there has been no such interpretation by the Courts of Louisiana which applies either in terms or reasons, to the case at bar.

Respectfully submitted,

CHAS. E. FENNER,

Counsel for Plaintiff in Error.

IN SUPREME COURT

OF THE UNITED STATES.

No. 748.

THE MOBILE LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

versus

SAMUEL D. BRAME, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the District of Louisiana.

ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

JOHN H. KENNARD,

B. F. JONAS,

Of Counsel.

A. W. Hyatt, Print, 38 Camp St.

IN SUPREME COURT

OF THE UNITED STATES.

No. 715.

THE MORTLE LIFE INSURANCE COMPANY,

Plaintiff in Error,

versus

SAMUEL D. BRAND, Defendant in Error.

Error to the Special Court of the U. S. for the Northern District of Louisiana.

ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

JOHN R. KENNARD,

E. F. JONAS,

Of Counsel.

A. W. Hyatt, Print. & Stereotype.

IN SUPREME COURT

OF THE UNITED STATES,

No. 748.

THE MOBILE LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

versus

SAMUEL D. BRAME, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the District of Louisiana.

ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

Plaintiff, a life insurance company, brought suit against defendant for the sum of seven thousand dollars, on the following allegations :

That plaintiff had insured the life of one Craven McLemore, a citizen of Louisiana, for the sum of $2000 in favor of John P. Kennedy, for the sum of $2500, in favor of Sanders, Garner & Co., (which was subsequently

assigned to Jno. H. Garner, Sr.,) and for $2500 in favor of John H. Garner & Co.

That on the 24th day of October, 1875, while said policies were in force, in the town of Delhi, in Louisiana, defendant, Samuel D. Brame, did wilfully shoot the said Craven McLemore, and inflict upon him a mortal wound, from the effects of which he died on the 26th day of October, 1875. That the said shooting was an illegal and tortious act on the part of said Brame, and caused damage to the plaintiff in the said sum of $7,000, being the amount of said policies on the life of said McLemore which plaintiff acknowledges to be due, and a part of which she alleges has been paid.

Defendant filed an exception (demurrer) to plaintiff's petition (page 12 pr. R.) as follows:

"Now comes Samuel D. Brame, herein cited as defendant, and excepts to the petition and action of plaintiff on the following grounds:

"First. That plaintiff's petition discloses no cause of action against this defendant.

"Second. That plaintiff has no right of action surviving to her or growing out of the death of Craven McLemore, which can be urged against this defendant.

"Third. That if the facts alleged in the petition be true, which is denied, then a right of action would only survive to the widow and heirs of the said McLemore."

This exception (after argument) was sustained by the Court, and plaintiff's suit dismissed, (p. 13 Rec.)

From this judgment the present writ of error has been taken.

LAW OF LOUISIANA.

Prior to the year 1855, there was no law in this State which gave a right of action at all for damages resulting from the death of a person.

Suits were brought to recover damages in such cases under the provisions of Article 2,294, (now Article 2,315) of the Civil Code of Louisiana, which read as follows:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened, to repair it."

Twice was the Supreme Court of Louisiana called upon to interpret this statute, under which it was sought to recover damages for the tortious destruction of life of a human being, at the suit of the widow and heirs of the deceased.

In each case the plaintiff had recovered heavy damages from a jury, showing that the defendant had caused the loss of life by a tortious and wrongful act, and the verdict of the jury was sought to be maintained before the Supreme Court, by as able and learned arguments as were ever addressed to that tribunal.

The first case is that of Hubgh vs. the New Orleans and Carrollton Railroad Company, reported in the Sixth of Louisiana Annual Reports, page 496.

After a learned and elaborate opinion, Chief Justice Eustis, (the organ of the Court in this case,) reached the following conclusion:

"We consider it unquestionable that no civil action can be maintained under the common law by the relations for the death of a free person. The authorities which have been adduced and commented upon, we think conclusively show it. Finding that no such action was ever instituted in this State, our inquiries were necessarily directed to the examination of the former jurisprudence of Louisiana in order to ascertain whether the action could be based on any well recognized principle in the Roman or the Spanish laws. If the uniform understanding of the bar, deducible from the fact that no such suit was ever brought, has recognized the prevalence of the same principle in this State, which has obtained in England and the United States, the present state of things on this subject, it would not be proper to disturb for light reasons, or for anything short of a clear and decided command of the law. There is nothing shown which would authorize a Court to abandon a course which has been followed by a people with whom a regard for all personal rights is paramount, and from whom we have derived a large portion of our laws, and been continued in by the States of the Union.

In England the law has been recently changed; and it will rest with the legislative power alone to provide the remedy sought if public policy requires its introduction."

This decision was reaffirmed by the Supreme Court in the case of Herman vs. Carrollton Railroad Company, reported in Eleventh Louisiana Annual Reports, page 21.

Chief Justice Merrick, who was the organ of the Court, says in conclusion, "It is sufficient to repeat, that we have not been convinced that the construction of Article 2294, Civil Code, by our predecessors (6th Annual, 495,) is erroneous, and we, therefore, consider it our duty to follow their decision."

In 1855, after the decision in the Hubgh case, the Legislature amended the Article 2294, C. C., so as to read, "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened, to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death."

Acts of Louisiana, 1855, No. 223, p. 270.

By this statute was given, for the first time in this State, a right of action to recover damages suffered by the unlawful or tortious killing of a person, and the right is expressly limited to the surviving wife, descendants or ascendants of the deceased, and is not extended to collateral heirs, far less to creditors.

This amendment was made to Article 2294, C. C., after the Supreme Court had decided that no such right of action could be urged as based upon that article, and is a legislative interpretation of the article in strict accordance with that given by the Court.

The right of action exists now because authorized by

special statute, which must be construed strictly, and which cannot be enlarged by the Court.

The learned counsel for the plaintiff urges in his brief, that Article 2294, Civil Code, is exactly the same as Article 1382 of the Code Napoleon, and that under the latter article the Courts of France have held that recovery might be had for damages caused by the loss of life of a person.

But the same argument was used, and the same authorities quoted to the Supreme Court of Louisiana, in the cases of Hubgh & Herman, just referred to.

The Court say in the case of Hubgh (6th Annual, 512,) "It seems to be evident that the decisions of the Court of Cassation, to whatever extent they may have been considered as furnishing a safe guide to the application of the article of the Code of Louisiana, similar to those of the French Code, in cases in which the former jurisprudence was similar to that of France, would cease to be applicable in those subjects of law, in which the jurisprudence of the two countries was different. The application of the Article of the Code of Napoleon to be made is to the law of France, and would under the sanction of that distinguished tribunal, furnish a safe rule in cases where the law was similar, and of course no rule whatever, where the law was materially different. *In the case, therefore, under consideration, the law being different in Louisiana, from that in France,* as the latter is assumed to be in argument, *and the application of the article being to the law of Louisiana and not to that of France,* the import

and sense of the article, becomes entirely an open question, and the responsibility of determining its application is thrown upon the Court without the aid of any authority, and unrestricted by any interpretation."

And the Court, after a careful analysis of the sources of the French and Roman law, says, (page 513,) "Conceding that it was the intention of the framers of the Code Napoleon to embrace the civil reparation of an injury caused by homicide, to the relations of the deceased, and that the Court of Cassation decided correctly in the interpretation and application of the Article 1382, C. N., we do not feel authorized to give to the similar article of our Code, the same application in a system of laws, differing from that prevailing in France, in which the Code Napoleon was to operate.

This is affirmed in the Herman case in every respect.

The Supreme Court of the State having given this construction to Article 2294, C. C., and it having remained, and been acquiesced in, as the jurisprudence of Louisiana for over twenty-five years, it cannot be changed now by reference to the jurisprudence of other countries, living under different or even similar systems of law.

Article 2294, Civil Code, and the whole Code, is a State statute, originally adopted in 1825, and revised and reenacted in 1870. (See Revised Civil Code, approved March 14, 1870.)

"The Federal Courts follow the decisions of the State tribunals on all questions dependent upon the local statute laws of the States."

1 Brightley Dig., p. 812, sec. 59 ; 1 Custis, 481 ; 1 McLean, 35 ; 3 McL., 397 ; 6 McL., 587.

This is a rule of such universal application that it is hardly necessary to quote authority.

At common law no recovery can be had for damages resulting from the death of a human being, and when an action has been accorded by statute in some of the States, it has been limited (as in Louisiana, by the act of 1855) to the benefit of the immediate heirs of the deceased.

Mr. Hilliard says, in his work on costs, (Vol. 1, p. 83, sec. 10): "Upon similar ground it has been held, that at common law, *the death of a human being*, though clearly involving pecuniary loss, is not the ground for an action for damages; therefore where the wife of the plaintiff was killed by the overturning of a coach, that he could recover damages for the loss of her society, etc., only up to the time of her death. So no action lies by a husband, whose wife was killed instantaneously by the carelessness of a railway corporation."

1 Camp., 493 ; 23 Ind., 133 ; 14 B. Won., 204.

In Massachusetts it has been decided that "no action lies on a promise by a railroad company to pay to the widow of one who was killed by an accident on their railroad, a certain sum of money, in consideration of her forbearance to sue them for damages, as no action at common law, would lie against the company for the injury."

Palfrey vs. Portland, etc., 4 Allen 55 ; 8 Gray 152.

In the various States where the right of action has been

given by statute, it has only been accorded to heirs and next of kin, and has been restricted to their benefit.

In Illinois, where the statute accords the right to sue to the personal representative of the deceased, it was decided, "*that the object of the act is to exclude creditors, and prevent the amount being treated as part of the estate of the deceased.*"

See Chicago vs. Mayor, 18th Illinois, 349:

In the case of the Connecticut Mutual Life Insurance Company vs. New York and New Haven Railroad Company, 25th Connecticut, page 265, (which case is quoted in plaintiff's brief,) where, as in the present case, a Life Insurance Company sued to recover the amount of a loss paid upon the death of a person insured, who was killed by the negligence of the defendant company, the Supreme Court of Connecticut held that, "At the common law a party is not liable *civiliter* for the destruction of human life, whatever the nature of the consequences may be, or however clearly such a wrong may involve pecuniary damage."

They also decided in relation to the peculiar claim of the insurance company that "where one person has contract relations with another, an injury to the latter, which affects disastrously those relations, does not constitute a legal injury to the former.

Where an insurer has been compelled to pay the insurance on the life of a person, whose death has been caused by the unlawful act of a third person, and where there is no privity of contract between the insurer and

the wrong doer, and no direct obligation of the latter to the former, growing out of the relation of the wrong doer to the insured, by contract or otherwise ; though the loss of the insurer is due to the acts of the wrong doer, yet as those acts affect the insurer, only through his artificial relation of contrator with the insured, the loss is a remote and indirect consequence of the act of the wrong doer, and no action therefor can be sustained against him by the insurer."

The doctrine of this case exactly covers the one at bar, were it necessary to seek for authority outside of the jurisprudence of Louisiana.

We think no such necessity exists. The plaintiff's counsel has much to say in his argument, as to the equity of his case, and the necessity of fostering and protecting Life Insurance Companies.

No one can doubt the beneficial influence of these companies, when faithfully administered, and the claims set forth in their behalf may be entitled to great weight with the Legislature, which alone can afford them such remedies as are asked from the Court in this case.

This is a foreign insurance company, coming to Louisiana to do business and make contracts, which must be governed by the laws of Louisiana.

Those laws, as expounded by the highest tribunal of the State, denied any right of action whatever for damages caused by the tortious death of a person, even to his widow and children, whose claims were certainly much

stronger than those of the Insurance Company which had insured his life, (as in this case) for the benefit of his creditors

The Legislature thought proper in 1855, to accord a right of action to the widow and children, and in their default to the parents of the deceased.

It did not think proper to accord a similar right of action to creditors or insurance companies, and this Court cannot supply the remedy which the lawmaker has failed to give.

The exceptions to the general law made by the act of 1855, must be construed *stricti juris.*

If the plaintiff has suffered damage, it has been through its own avidity to settle the loss.

Defendant was tried and acquitted of the homicide. This is a fact, and must be admitted, because, otherwise plaintiff could not have instituted this suit. If he was acquitted it was because the jury found the homicide justifiable, and at least the verdict carries with it the presumption of innocence. If the homicide was justifiable, then McLemore was in the wrong, and met his death while violating the law, and if so the Insurance Company was discharged from liability under the policy (see policy, page 9). Why did not the plaintiff require suit to be brought upon these policies, and make defense and require proof to show that the loss occurred within the terms of the policies?

On the contrary, it adjusted the loss; assumed that Mc-

Lemore was right and Brame wrong, and lost its chance to protect its interests, should the facts prove otherwise

We respectfully ask that the judgment of the Circuit Court, dismissing the action of plaintiff, may be affirmed with costs.

JOHN H. KENNARD,
B. F. JONAS,
Of Counsel.